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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-619

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA,
Petitioner

v.

PILOT FREIGHT CARRIERS, INC.,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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OPINIONS BELOW

The memorandum order of the United States District Court for the Middle District of North Carolina denying motions for summary judgment is unreported and is reprinted at App. A, pp. 1a-3a *infra*. The order of the Court of Appeals granting respondent's motion to dismiss the appeal is unreported and is reprinted at App. B, pp. 4a-5a *infra*.

JURISDICTION

The order of the Court of Appeals dismissing the appeal was entered on September 2, 1977. This Court has jurisdiction under 28 U.S.C. § 1254(1).

QUESTION PRESENTED

Where a defendant has moved to dismiss a suit for breach of a collective bargaining agreement on the ground that the agreement requires arbitration of the question of breach, is the denial of such a motion appealable under 28 U.S.C. § 1291 in accordance with the "collateral order" doctrine of *Cohen* v. *Beneficial Ind. Loan Corp.*, 337 U.S. 541?

STATUTE INVOLVED

This case involves 28 U.S.C. § 1291, which provides:

> "The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court."

STATEMENT OF THE CASE

This petition arises out of two separate actions brought by respondent in the United States District Court for the Middle District of North Carolina against petitioner, under § 301(a) of the Labor Management Relations Act of 1947 ("LMRA"), 29 U.S.C. § 185. Respondent Pilot Freight Carriers, Inc. (hereafter "Pilot"), is a common carrier of general commodity freight; petitioner International Brotherhood of Teamsters (hereafter "IBT"), is a labor organization. In both actions Pilot presently seeks substantial damages for alleged violations by the IBT of the no-strike provisions of the National Master Freight Agreement (hereafter "NMFA"), a nationwide, multi-employer agreement: C-219-WS-72 (hereafter "*Pilot I*") grows out of a 1972 strike and asserts that the IBT violated the 1970-1973 NMFA; C-74-69-WS (hereafter "*Pilot II*") grows out of a 1974 strike and asserts that

the IBT violated the 1973-1976 NMFA. We need not describe these strikes, nor detail the issues on which plaintiff's claims against the IBT depend, for the present Petition relates to an anterior question: whether the merits are properly before the District Court at all, or whether, as the IBT has contended on motions for summary judgment, Pilot's exclusive remedy for breach of the agreements is the arbitration procedure established by those agreements. The specific issue raised by the Petition is narrower yet—whether an appeal lies from the District Court's order denying the IBT's motions, and holding that plaintiff may pursue its claims in court. Accordingly, a rather summary description of the complaints and the prior proceedings in these actions will suffice to put this Petition in its proper context.

A. The Complaints and Pilot's Reliance on the Agreements' Arbitration Provisions.

In both actions Pilot's complaint alleges that the contracts under which it sues "contain[] a grievance procedure established for the purposes of resolving all disputes between the parties involving the application and interpretation of such agreement." [1] In both actions that proposition was asserted by Pilot in support of motions to enjoin a work stoppage which was then in progress; on both occasions the District Court, purporting to rely on *Boys Markets* v. *Retail Clerks*, 398 U.S. 235, granted the motion and issued an injunction.[2]

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[1] *Pilot I*, Complaint ¶ 4; *Pilot II*, Complaint ¶ 5. In *Pilot II* the Complaint also alleged: "Plaintiff is willing to arbitrate the dispute created by the defendant labor organizations, and has filed grievances for the purpose of determining whether the employees covered by the aforesaid agreements have contractually bound themselves not to honor such a picket line and thereby engage in a work stoppage." (*Id.*, ¶ 10.)

[2] No appeal was taken from the granting of the injunction in *Pilot I*. In *Pilot II*, the Court of Appeals modified and affirmed the injunction (*Pilot Freight Carriers, Inc.* v. *Intern. Broth. of Teams.*,

B. The Motions for Summary Judgment, and Their Denial by the District Court.

The IBT filed separate motions in *Pilot I* and *Pilot II* for summary judgment dismissing the complaint on the ground that the arbitration provisions of the NMFA set forth Pilot's exclusive remedies for a claimed breach of that agreement. The IBT argued in both cases: (1) that this result is required by the agreement as read in light of the national labor policy in accordance with *Drake Bakeries* v. *Bakery Workers*, 370 U.S. 254, and decisions of all eleven circuits following that precedent; and (2) that Pilot, having obtained an injunction by asserting that the legality of the strike was arbitrable under the agreement, was precluded from taking the inconsistent position that the claim was not arbitrable.

In *Pilot II*, the IBT made the additional points that it was not even open to the District Court to hold that Pilot's claim was not arbitrable, because the Court of Appeals'

Etc., 497 F.2d 311 (4 Cir. 1974), *cert. denied*, 419 U.S. 869). As a necessary predicate for its decision the Court construed the arbitration provision of the 1973-1976 NMFA:

> "The National Master Freight Agreement in the present case *does have a mandatory grievance procedure* (Article 8) *regarding any dispute under the contract.* The relationship between the no-strike clause and the clause allowing individual employees to refuse crossing a primary picket line was, we think, an arbitrable matter, as is Pilot's contention about the underlying dispute, whether the local union or national union had directed or influenced concerted activity not to cross the picket line, as opposed to individual employees' decisions not to cross it. On the merits, the arbitration must decide whether Article 9, whatever its scope is found to be, had been complied with or whether the union is using Article 9 as a subterfuge to strike in violation of the agreement. We think the parties intended to submit disputes of this nature to arbitration, and, in any event, we must construe the agreement liberally in favor of arbitration. *United Steelworkers of America* v. *Warrior and Gulf Navigation Co.*, 363 U.S. 564, 80 S.Ct. 1347, 4 L.Ed.2d 1409 (1960)." 497 F.2d at 313, emphasis supplied.

interpretation of the 1973-1976 agreement (see p. 4, n. 2, *supra*) was binding as the law of the case; and further that even if arbitration was not required by the NMFA, Pilot was bound to arbitrate by its own submission of the dispute to arbitration, notwithstanding its unilateral withdrawal therefrom.[3]

On January 13, 1977, the District Court (H. Ward, J.) denied both motions in separate paragraphs of the same memorandum (App. A, pp. 1a-3a *infra*).

C. The Appeal and Its Dismissal by the Court of Appeals.

The IBT promptly filed a notice of appeal, and docketed the appeal in the Court of Appeals. Thereafter, the District Court amended its prior order and certified the appeal under 28 U.S.C. § 1292(b).[4] The Court of Appeals,

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[3] On June 4, 1974, Pilot instituted a proceeding against the IBT before the National Grievance Committee established under the NMFA, asserting the same breach of contract claim which is the basis of *Pilot II*. In aid of that proceeding Pilot demanded, and IBT produced, voluminous records; thereafter, Pilot presented its case to the arbitrators. However, Pilot unilaterally withdrew from arbitration when the IBT moved to dismiss the *Pilot II* damage suit or to stay that suit pending completion of the arbitration proceeding. The District Court permitted that motion to lie dormant for over a year, and IBT subsequently filed the motion for summary judgment on which the District Court ultimately ruled.

[4] The Amendment read in full as follows:

> "The defendants in Case Nos. C-219-WS-72 ('Pilot I') and C-74-69-WS ('Pilot II') have requested that this Court amend its bench order of January 13, 1977, and certify those cases for immediate appeal pursuant to 28 U.S.C. § 1292(b).
>
> While the denial of a motion for summary judgment under normal circumstances is not appropriate for certification under 28 U.S.C. § 1292(b), the Court believes that these cases are far from average. 'Pilot I' and 'Pilot II' are anything but the ordinary personal injury or wrongful death suit for which 28 U.S.C. § 1292(b) has been determined to be inapposite. *Kraus* v. *Board of County Road Commissioners*, 364 F.2d 919 (6th Cir. 1966); *Cardwell* v. *Chesapeake & Ohio Railway Co.*, 504 F.2d

however, denied leave to appeal.[5] Pilot thereupon moved to dismiss the appeal for want of jurisdiction. The IBT opposed that motion, urging that where a party moves the District Court to dismiss a complaint because arbitration is the exclusive remedy, an order denying such motion is final for purposes of 28 U.S.C. § 1291 under the "collateral order" doctrine established in *Cohen* v. *Beneficial Ind. Loan Corp.*, 337 U.S. 541. IBT relied particularly on a decision of the Second Circuit which specifically held that such an order satisfies the requirements of *Cohen* (*Local 771, I.A.T.S.E., AFL-CIO* v. *RKO General, Inc.*, 546 F.2d 1107, see pp. 7-10, *infra*), and on a very recent analysis of the *Cohen* rule by this Court (*Abney* v. *United States*, — U.S. ——, 45 U.S.L.W. 4595, see pp. 10-12, *infra*). The Court of Appeals granted the motion to dismiss the appeal, without comment, see App. B, pp. 4a-5a, *infra*.

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444 (6th Cir. 1974). 'Pilot I' and 'Pilot II' are extremely complex and involve a myriad of facts. In all fairness the defendants have put forward controlling legal questions to which substantial grounds for a difference of opinion exists. Should the controlling law be otherwise than interpreted by this Court there is no doubt but that time and effort will be spared. For these reasons this Court amends its bench order of January 13, 1977, and hereby certifies Civil Cases C-219-WS-72 and C-74-69-WS for immediate appeal under the provisions of 28 U.S.C. § 1292(b)."

[5] The Court's order read in full as follows:

We have considered the petition for an interlocutory appeal and are of opinion it is without merit.

It is accordingly ADJUDGED and ORDERED that the petition for an interlocutory appeal shall be, and the same hereby is, denied.

With the concurrence of Judge Hall; Judge Haynsworth would grant the interlocutory appeal.

/s/ H. E. Widener, Jr.
(H. E. WIDENER, JR.)
For the Court

REASONS FOR GRANTING THE WRIT

I. The Decision Below Is in Conflict With a Recent Decision of Another Court of Appeals.

The decision of the Court of Appeals dismissing the appeal herein is in direct conflict with the decision of the Second Circuit in *Local 771, I.A.T.S.E., AFL-CIO* v. *RKO General, Inc.*, 546 F.2d 1107 (C.A. 2) (hereafter "*RKO General*"). There, the Second Circuit squarely held that in a suit under § 301(a) of the LMRA to enforce rights under a contract, an order of the District Court denying a motion to dismiss the complaint is appealable under 28 U.S.C. § 1291 where the ground for the motion was "that arbitration was the exclusive remedy under the contract" (*id.* at 1111).[6]

The Court stated the issue to be whether such an order "satisfies the conditions laid down by the Supreme Court in *Cohen* v. *Beneficial Ind. Loan Corp.*, 337 U.S. 541, 546 (1949) for appeal in certain exceptional cases from interlocutory orders determining collateral or separable rights that are 'too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated' " (546 F.2d at 1112, quoting 337 U.S. at 546). Judge Mansfield's reasoning in support of the conclusion that such an order "meets the *Cohen* criteria" (546 F.2d at 1112) merits quotation in full:

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[6] The factual background of the *RKO General* case was not material to the Court's holding that it had jurisdiction under 28 U.S.C. § 1291. It suffices to note, therefore, that there a union had made a claim under the collective bargaining agreement and sued under § 301(a) to enforce its rights under that agreement. Its grievance had originally been presented to an arbitrator who determined that it was time-barred and therefore refused to rule on the merits. The District Court confirmed the arbitrator's determination that arbitration had not been timely invoked, but denied the employer's motion to dismiss the complaint, ruling that arbitration was merely optional under the agreement (546 F.2d at 1111-1112).

"The interpretation of the arbitration provisions of the collective bargaining agreement presents an issue that is separable from and collateral to the main issue in the case, which is whether the employees who are members of Local 771 are entitled to be assigned to news-gathering and editing functions in the operation of minicam units. Under analogous circumstances we have held that an issue regarding the right to trial in a different forum is separable from and collateral to the merits for purposes of applying the *Cohen* rule. *CAB* v. *Aeromatic Travel Corp.*, 489 F.2d 251 (2 Cir. 1974) (whether CAB had primary jurisdiction held appealable). See also *Local 438 Construction & General Laborers Union, AFL-CIO* v. *Curry*, 371 U.S. 542, 548-50, 83 S.Ct. 531, 9 L.Ed. 2d 514 (1963); *Mercantile National Bank* v. *Langdeau*, 371 U.S. 555, 558, 83 S.Ct. 520, 9 L.Ed.2d 523 (1963) (involving Supreme Court review under 28 U.S.C. § 1257).

The Company's claim that the district court's decision violates the national labor policy in favor of minimum judicial intervention and exclusivity of arbitration conducted under the terms of labor agreements, see *United Steelworkers of America* v. *Enterprise Wheel & Car Corp.*, 363 U.S. 593, 80 S.Ct. 1358, 4 L.Ed.2d 1424 (1960), unquestionably presents an important question, the gravity of which is emphasized by the similarity of the arbitration provision in the Agreement at issue to the 'standard form,' see *United Steelworkers of America* v. *American Mfg. Co.*, 363 U.S. 564, 80 S.Ct. 1343, 4 L.Ed.2d 1403 (1960); *Bonnot* v. *Congress of Independent Unions Local No. 14*, 331 F.2d 355 (8th Cir. 1964).

Finally, the Company's right to be relieved of the costs and delays of trial, which it claims to have gained through the contract's arbitration provisions, will be lost irretrievably if proceedings in the case go forward in the district court. This case is analogous to *United States* v. *Beckerman*, 516 F.2d 905 (2d Cir. 1975), where we recognized that an immediate appeal was essential to protect and enforce the defendant's claim, based on double jeopardy grounds, to be free from any further proceedings in the district court, rather than ultimately to gain a judgment in his favor after further protracted proceedings. See also *Weilbacher* v. *J. H. Winchester & Co.*, 197 F.2d 303 (2d Cir. 1952). This claim, which appears to be more than merely colorable in the present case, distinguishes the case from a run-of-the-mill attempted piecemeal appeal from a denial of a motion to dismiss, which is not appealable for the reason that the appellant may prevail at trial or ultimately be vindicated upon appeal from an adverse final judgment. Accordingly, we uphold the Company's right to appeal under the *Cohen* rule * * *" (546 F.2d at 1112-1113).

The present case is indistinguishable from *RKO General.* The question of the arbitrability of the Company's claims that the defendant breached the no-strike clause of the NMFA is clearly collateral to the merits of those claims; indeed, the very point of the motion for summary judgment—and the purpose of the arbitration provision—is to assure that the merits be determined by an arbitrator rather than by a court. The identical national labor policy favoring arbitration is involved whether a party seeks to compel arbitration in preference to a judicial resolution of the dispute (as here[7] and in *Nolde Bros.* v. *Bakery*

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[7] In *Pilot I* the Company has refused to arbitrate its claim and in *Pilot II* the Company withdrew in the middle of the arbitration proceeding. See pp. 4-5, and particularly p. 5, n. 3, *supra*. And while we think that the terms of the arbitration provision are less material to the issue of immediate appealability than to the issue of arbitrability, we note that, as the Court of Appeals determined at a prior stage of this litigation, "[t]he National Master Freight Agreement in the present case does have a mandatory grievance procedure (Article 8) regarding any dispute under the contract." See p. 4, n. 2, *supra*.

Workers, 430 U.S. 243), or is seeking to enforce an arbitration award already entered (as in *RKO General* and *Steelworkers* v. *Enterprise Corp.*, 363 U.S. 593). Finally, it is just as true here as it was in *RKO General* that the defendant's "right to be relieved of the costs and delays of trial, which it claims to have gained through the contract's arbitration provisions, will be lost irretrievably if proceedings in the case go forward in the district court." 546 F.2d at 1112. That these costs would be substantial is implicit in the District Court's certification that these cases "are extremely complex and involve a myriad of facts" and that if its order should be reversed on appeal "there is no doubt but that time and effort will be spared" (see p. 6, n. 4 cont., *supra*).

In short, the failure of the court below to explain its order cannot obscure the conflict of decisions between the Circuits: When a defendant moves to dismiss a § 301 (a) complaint on the ground that the arbitration provisions of a collective bargaining agreement provide the exclusive remedy for a breach thereof, and the District Court denies the motion, such an order is appealable in the Second Circuit, but not in the Fourth.

II. The Decision Below Is Inconsistent With This Court's Teaching That 28 U.S.C. § 1291 Must Be Given a "Practical Rather Than a Technical Construction."

It is likewise clear, despite the Court of Appeals' silence, that in dismissing the appeal herein it ignored this Court's instruction that the term "final decision" in 28 U.S.C. § 1291 is to be given a "practical rather than a technical construction" (*Cohen, supra*, 337 U.S. at 546), and most particularly the recent application of the *Cohen* principle in *Abney* v. *United States*, 45 U.S.L.W. 4594 (June 9, 1977). In *Abney* it was unanimously held that "although the pretrial denial of a motion to dismiss an indictment on double jeopardy

grounds is obviously not 'final' in the sense that it terminates the criminal proceedings in the District Court", "it is nevertheless within the 'collateral order' exception to the final judgment rule first announced in *Cohen* * * *" (*id.* at 4595). In holding that such an order is appealable, this Court approved the decisions of several courts of appeals, including that of the Second Circuit in *United States* v. *Beckerman*, 516 F.2d 905, to which the *RKO General* Court had analogized the problem in this case, see p. 9, *supra*. The aptness of that analogy and, more significantly, the inconsistency between the decision below and this Court's interpretation of 28 U.S.C. § 1291 readily appears when we track the Chief Justice's reasoning in *Abney*:

First, even as the denial of a motion to dismiss an indictment on double jeopardy grounds "constitute[s] a complete, formal and, in the trial court, a final rejection of a defendant's double jeopardy claim," (*id.* at 4596), so here the District Court's denial of the motions for summary judgment constitutes "a complete, formal and, in the trial court, a final rejection of" the defense that the procedures under the arbitration provisions of the agreement are exclusive.

Second, just as "the very nature of a double jeopardy claim is such that it is collateral to, and separable from, the principal issue at the accused's impending criminal trial, *i.e.*, whether or not the accused is guilty of the offense charged" (*id.*), so too, the arbitrability of a claimed breach is entirely distinct from the question on the merits, *i.e.*, whether the defendant violated the no-strike promise (or any other duty to perform under the agreement).

Third, the Chief Justice observed that "the rights conferred on a criminal accused by the Double Jeopardy Clause would be significantly undermined if appellate

review of double jeopardy claims were postponed until after conviction and sentence" because "even if the accused is acquitted, or, if convicted, has his conviction ultimately reversed on double jeopardy grounds, he has still been forced to endure a trial that the Double Jeopardy Clause was designed to prohibit." *Id.* at 4596-4597. So too, even if a defendant charged with breaching a collective bargaining agreement should win on the merits after trial, or if after a judgment were entered for the plaintiff an appellate court were to hold that the court should not have reached the merits of the claim, the defendant's interest "in obtaining a prompt and inexpensive resolution of [its] disputes by an expert tribunal," would have been totally destroyed, for "the alternative remedy of a lawsuit is the very remedy the arbitration clause was designed to avoid." *Nolde Bros., Inc., supra,* 430 U.S. at 254.[8]

Thus, the result reached below cannot be reconciled with "the core principle that statutorily created finality requirements [expressly including 28 U.S.C. § 1291] should, if possible, be construed so as not to cause crucial collaterial claims to be lost and potentially irreparable injuries to be suffered * * *" (*Mathews* v. *Eldridge*, 424 U.S. 319, 331, n. 11).

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[8] The Court in *Abney*, in turn, expressly recognized that:

> "A cogent analogy can be drawn to the *Cohen* decision. There, the corporate defendant claimed that the state security statute, if applicable, conferred on it a right not to face trial at all unless the dissatisfied shareholder first posted security for the costs of the litigation. By permitting an immediate appeal under those circumstances, this Court made sure that the benefits of the statute were not 'cancelled out.'" (45 U.S.L.W. at 4597, n. 7, emphasis added.)

So here, the IBT's claim has been that the arbitration provisions of the agreements confer on it the right not to face trial at all; permitting an immediate appeal is necessary to make sure that the benefits of those provisions are not "cancelled out."

III. The Decision Below Frustrates the National Labor Policy and Efficient Judicial Administration.

Review and reversal of the judgment below is called for not only to achieve uniformity of decisions in the courts of appeals, and harmony with the jurisdictional principles established by this Court, but also to promote two important public policies. What has already been said is sufficient to demonstrate that the decision below frustrates, and that of the Second Circuit in *RKO General* effectuates, the "well-established federal labor policy favoring arbitration as the means of resolving disputes over the meaning and effect of collective-bargaining agreements" (*Nolde Bros., supra,* 430 U.S. at 254), which, as was there reaffirmed, is embodied in § 203(d) of the LMRA, 29 U.S.C. § 173(d). But it is equally true, if perhaps less obvious, that the decision below tends to subvert the very interests of judicial administration which the finality requirement is intended to serve.

Given the existence of tens of thousands of labor-management contracts and the myriad controversies which daily arise thereunder, the burden on the federal courts imposed by the jurisdictional grant of § 301(a) would be exceedingly onerous—both in terms of the courts' workload and the acknowledged limitations on their institutional competence—if the parties did not, in their own self-interest, customarily agree to resolve such disputes by arbitration and other private methods of adjustment. See, *Buffalo Forge Co.* v. *Steelworkers*, 428 U.S. 397, 410-411. These perhaps unintended, but assuredly significant, benefits to judicial administration can be fully realized only if erroneous denials of arbitrability are set aside before, rather than after, there has been a full-blown trial on the merits of the underlying labor-management controversy.

CONCLUSION

For the foregoing reasons, this Petition for Certiorari should be granted.

Respectfully submitted,

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APPENDIX A

Memorandum of the District Court

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF NORTH CAROLINA
WINSTON-SALEM DIVISION

Civil Action
Nos. C-215-WS-72
C-219-WS-72
C-74-69-WS
C-75-76-WS

PILOT FREIGHT CARRIERS

v.

LOCAL 391, IBT, et al.

MEMORANDUM

This matter was scheduled for hearing on all pending motions in the United States Courtroom, United States Courthouse and Federal Building, Winston-Salem, North Carolina, January 13, 1977. William K. Davis, Esq., J. W. Alexander, Jr., Esq., and John Pollard, Esq., appeared as counsel for the plaintiff. Robert Higgins, Esq., Ira Mitzner, Esq., Renn Drum, Esq., Jonathan Axelrod, Esq., Hugh Beins, Esq., and Norman B. Smith, Esq., appeared as counsel for the defendants.

The several motions before the Court are resolved as follows:

I. In C-219-WS-72, Pilot v. International Brotherhood of Teamsters, Chauffeurs, Warehousemen, and Helpers of America, the union's motion for summary judgment is denied. The union asserts that the National Master

Freight Agreement requires arbitration of all questions prior to the pursuit of any court action against the union. This Court recognizes the broad national policy favoring arbitration emphasized by the Supreme Court in Drake Bakeries v. Local 50, American Bakery & Confectionery Workers International, AFL-CIO, 370 U.S. 254, 8 L.Ed. 2d 474, 82 S.Ct. 1346 (1962), and by the Fourth Circuit in H. K. Porter Co. v. Local 37, United Steelworkers of America, 400 F.2d 691 (4th Cir. 1968).

In *H. K. Porter* the Fourth Circuit said "The obligation to arbitrate must be found in the collective bargaining agreement. It is a matter of contract, and in the absence of agreement, a party cannot be required to submit a dispute to arbitration (citation omitted). But in construing the contract, doubts must be resolved in favor of arbitration." In the present case the Court has no doubts to be resolved in favor of arbitration.

Article 8(a) of the National Master Freight Agreement requires "All grievances or questions of interpretation arising under this Master Agreement . . ." to be submitted to arbitration. That language is not nearly so broad as the contract provisions in *Drake Bakeries, supra,* or *H. K. Porter, supra.* The contract in *Drake Bakeries* required arbitration of "all complaints, all disputes, and all grievances . . . or any contract of either party." The contract in *H. K. Porter* calls for the arbitration of "any grievance or disagreement which cannot be settled between the Employer and the Union. . ." Moreover the explicit wording of the National Master Freight Agreement excludes this claim for damages from arbitration. In outlining the arbitration process the agreement establishes procedures for settling disputes concerning "unauthorized" strikes. The strike in question, however, is admittedly an authorized strike. A procedure to be followed in handling authorized strikes is conspicuously absent. The contract reserves the rights of both parties to

seek judicial relief in other situations by stating "Nothing herein shall prevent the Employer or Union from securing remedies granted by law except as specifically set forth in this subsection." Therefore, the closing statement specifically reserves the right of Pilot to seek legal relief in the way of damages for an authorized strike.

II. In C-74-69-WS, Pilot v. Local 31, International Brotherhood of Teamsters, et al., the defendant International's motion to dismiss or alternatively to stay proceedings pending arbitration and the defendant International's motion for summary judgment are likewise denied. The Court is fully aware that the National Master Freight Agreement in force at the time of the 1974 strike differs from the contract which was in issue in the preceding motion. In addition to having language similar to the contract provisions discussed in the previous motion, the 1973-1976 agreement contains even more explicit language removing this matter from the type of dispute which is to be arbitrated.

Article 44 of the 1973 to 1976 agreement provides that "there shall be no strike without using all possible means for settlement. . . ." Following a description of the procedure to be utilized to settle grievances which are arbitrated, the agreement expressly provides that "nothing herein shall prevent legal proceedings by the Employer where the strike is in violation of this Agreement." Therefore, if the union strikes without first resorting to arbitration, as in the present case, the arbitration requirement is negated and the contract specifically allows the employer to seek legal relief. Therefore, all of the defendant IBT's motions for arbitration are denied.

APPENDIX B

Order of the Court of Appeals

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

[Filed Sep. 2, 1977]

No. 77-1704

PILOT FREIGHT CARRIERS, INC.,
Appellee,

v.

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA,
Appellant.

Appeal from the United States District Court for the Middle District of North Carolina, at Winston-Salem.
Hiram H. Ward, District Judge.

ORDER

After careful consideration of all the papers filed in this matter,

IT IS ORDERED that appellee's motion to dismiss the appeal for want of a final judgment be granted. The motion of the appellant for a writ of mandamus is denied.

Done with the concurrence of Chief Judge Haynsworth and Judge Hall.

A True Copy, Teste:

William K. Slate, II, Clerk

By /s/ Faye L. Smith
Deputy Clerk

/s/ H. E. Widener, Jr.
United States Circuit Judge

CORRECTED COPY

Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

NO. 77-619

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA,

Petitioner

vs.

PILOT FREIGHT CARRIERS, INC.,

Respondent

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

BRIEF FOR PILOT FREIGHT CARRIERS, INC. IN OPPOSITION TO PETITION

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REASONS WHY A WRIT OF CERTIORARI SHOULD NOT BE ISSUED IN THIS CASE

I. Counterstatement Of The Case

In 1972, the Respondent, Pilot Freight Carriers, Inc., opened up a new segment of freight operations with facilities at various locations in the State of Florida.[1] The Company undertook to set up those op-

[1]Factual points not followed by references to appendices are substantiated in the official reports of cases to which the Court is cited later in this Counterstatement.

erations with independent contractors instead of employees.

The Union promptly demanded that these contractors be included by accretion under the coverage of the Union's National Master Freight Agreement which was already in effect between the Company and the Union as to areas of operation north of Florida. The Company rejected that demand. It was Pilot's position that such an accretion would unlawfully deprive these individuals of their right to express their wishes on the subject of union representation.

On April 7, 1972, the Union filed a grievance with a regional grievance committee, established under its contract with the Company, seeking interpretation of a clause in the contract dealing with the subject of "accretions". On May 24, 1972, Pilot filed a "unit clarification" petition with the National Labor Relations Board. In that petition, Pilot challenged the Union's assumption that the Florida contractors were "employees" within the meaning of the National Labor Relations Act. The Company also asserted that it was for the Board, and not an arbitration panel, to determine whether the alleged "accretion" being demanded was lawful under the Act in absence of a vote which would determine the wishes of the persons involved. *Pilot Freight Carriers, Inc. and International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America*, 208 NLRB 853 (1974). The Board assumed jurisdiction over the case.

Pilot also filed a motion with the grievance panel asking it to defer ruling on the grievance issue pending a determination of the legal issue by the Labor Board. The committee rejected that motion and issued an award sustaining the accretion demand. The Union proceeded forthwith to strike Pilot throughout its entire system to enforce that award.

The Company instituted a suit against the Union in the United States District Court for the Middle District of North Carolina, alleging that the Union was striking in breach of its contract. In support of this, it was furthur alleged that the arbitration award was an absolute nullity because it had been submitted by the Union to the wrong committee—a committee which had no authority under the contract to interpret its language. *Pilot Freight Carriers, Inc. v. International Brotherhood of Teamsters*, 353 F. Supp. 869 (M.D. N.C. 1972). Never, in its presentation of defenses, did the Union even suggest to the District Court that the Company's breach of contract allegations raised an arbitrable issue.

The District Court found as a fact that the arbitration award was void and that the Union's strike was, therefore, in breach of its contract. Upon the basis of the principles laid down by this Court in *The Boys Markets, Inc. v. Retail Clerks Union*, 398 U.S. 235 (1970), the Court enjoined the strike pending submission of the accretion issue to the National Grievance Committee which did have interpretative

jurisdiction under the contract. The Union acquiesced in that decision and ceased striking. It then submitted its grievance to that Committee, which in turn sustained the accretion as the Union requested.[1]

The National Labor Relations Board, acting under the authority set forth in Section 10(j) of the National Labor Relations Act, obtained from a United States District Court in Florida an injunction prohibiting the Union from attempting to enforce the accretion decision by resuming strike activities, pending the Board's resolution of the legal issues which were raised by Pilot's Petition. Upon appeal by the Union, the United States Court of Appeals for the Fifth Circuit affirmed. *Boire v. International Brotherhood of Teamsters*, 479 F. 2d 778 (5th Cir. 1973), *reh. den.*, 480 F. 2d 924 (1973).

The Court of Appeals noted that "the Union's primary contention" is "that regardless of the appropriateness of the unit it is seeking, it cannot be an unfair labor practice for it to obtain and enforce an arbitration award where there is no existing Board ruling contrary to the unit resolution found by the arbitrator". *Id.*, 479 F. 2d at 797. In rejecting that contention and sustaining the Board's position, the Court made the following observations:

---

[1]The District Court case described above, in which Pilot also included a prayer for relief for compensatory damages, has been characterized by the Union as "PILOT I", and is a subject of the Union's Petition herein.

"The final, binding effect of arbitration, so essential to labor peace, is not fully applicable where the questions before the arbitrator are almost wholly representational and potentially subject to the superior authority of the Board. When the central problem is one of the unit's appropriateness, the arbitrator is powerless to give a decision that will be 'final and binding' on the parties. . . . Where the arbitration award that is sought and received potentially runs afoul of the Act and threatens the Board's primary authority to determine the appropriate unit, it does not provide blanket insulation from unfair labor charges, particularly where, as here, the Board's processes have already commenced.

". . . Here, . . . where the award sought was almost purely a unit determination involving the §7 rights of 140 employees, we fail to see how the parties could have expected the award to be 'final' when every case since [*Carey v. Westinghouse Electric Corp.*, 375 U.S. 261 (1964)] explicitly states that the Board's authority is superior."

Id., 479 F. 2d at 802-803.

On January 31, 1974, the Labor Board issued its decision on the unit issue. It found that "the extension of the 1970 contract", to non-union Florida employees, "[does] serious violence to the mandate that employees' rights are to be protected" by the Board "under Section 9(b)" of the Act, and ruled that the Board

would not permit the Florida employees to be "included in [the existing contract] without allowing those employees the opportunity of expressing their preference" on the subject of union representation. *Pilot Freight Carriers, Inc. and International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America*, 208 NLRB 853, 85 LRRM 1179, 1184 (1974). There was no appeal from that Board decision.

In its decision, the Board also ruled that Pilot's Florida contractors were to be deemed "employees" within the meaning of Section 2(3) of the National Labor Relations Act. The Union then claimed that, by this time, it actually represented a majority of employees at the Company's Jacksonville Terminal, and upon the basis of that claim, resumed its strike on February 25, 1974, to force Pilot to recognize the Union at that terminal.

The Company filed a new action in the District Court in North Carolina alleging that the Union again was striking in breach of its contractual agreement. As was true in the prior case, the Union never suggested to the Court that such breach of contract issue was arbitrable under the contract. On April 5, 1974, the Court found as a fact that the strike was in breach of the contract and issued a new injunction. That injunction was stayed, modified and reinstated by the Court of Appeals for the Fourth Circuit. *Pilot Freight Carriers, Inc. v. Local 391, et al.*, 497 F. 2d 311 (4th

Cir. 1974), *cert. den.*, 419 U.S. 869 (1974).[1] Nevertheless, the strike continued without abatement.

Finally, the Company surrendered and the Union's strike ended in August, 1974. Because it then had extensive new claims against the Union which were not included in the PILOT II Complaint, the Company elected not to prosecute that action any further.

As an alternative, on March 6, 1975, Pilot filed a new Complaint setting forth all of its 1974 causes of action against the Union. That Complaint includes one count alleging, as in PILOT II, that the Union's 1974 strike was in breach of its contractual obligation to arbitrate grievances. In addition, a second and alternative count was included alleging that the Union's strike was in violation of a broad contractual prohibition against striking over grievances which are not subject to arbitration under the contract. Finally, separate counts were added alleging, among other things, that the strike was for an unlawful purpose and was conducted by unlawful means including criminal violence and legally prohibited secondary boycotting activities (App. D).[2]

---

[1]That case, which has been characterized by the Union as "PILOT II", is also a subject of the Union's Petition to the Court herein.

[2]In the proceedings below, that action was characterized by the Union as "PILOT III".

In view of the comprehensiveness of the PILOT III Complaint, Pilot has repeatedly and continuously offered to dismiss PILOT II voluntarily, provided that the Union would not claim, at a later date, that the fact of such dismissal barred or limited the Company's right to recovery in PILOT III. That offer of conditional dismissal is still outstanding and will not be withdrawn. The Union steadfastly refuses to permit a dismissal of the case on that condition.

A. The Stay Order Entered By The Court In Pilot II

It is only because of that impasse between the parties that PILOT II has not been dismissed. In an effort to assure that, notwithstanding that impasse, the Courts would never be burdened with further responsibilities in that case, on November 5, 1975, Pilot moved the District Court for an order staying any further proceedings in the case pending the outcome of the PILOT III damage action (App. E). That motion was granted by the Court in its Order of January 19, 1977, which states, in pertinent part, that "in [PILOT II] the plaintiff's motion to stay proceedings pending resolution of [PILOT III] is granted. [PILOT III] contains all the claims the plaintiff has presented in this action and therefore, the Court feels economy can be fostered by staying [PILOT II] at this time" (App. A, p. 4a). That ruling, which is a component part of the same Order for which the Union here seeks a review by writ of certiorari, is still in

full force and effect and has never been challenged by the Union.

B. Disputes Arising Over Strikes Authorized By The Union Were Contractually Excluded From Arbitration And Reserved For The Courts

Contrary to the appearance which is created by the Union's Petition, the contracts in issue are not silent on the question of whether the parties are free to litigate strike issues in the courts without going to arbitration. The contracts explicitly state that "nothing herein shall prevent the Employer or Union from securing remedies granted by law except as specifically set forth in this subsection 3(b)" (App.B, p. 6b; App. C, p. 8c). The limitations "set forth in this subsection 3(b)" are expressly restricted to disputes involving *unauthorized* strikes. The 1974 contract contains an additional reservation that "nothing herein shall prevent legal proceedings by the Employer where the strike is in violation of this Agreement" (App. C, p. 9c).

II. Argument

The central issue here is whether the Union can demonstrate, on a factual basis, that its present appeal efforts are not in conflict with the "firm congressional policy against interlocutory or 'piecemeal' appeals"—a policy to which the "courts have consistently given effect," upon the long established principle that "final-

ity of judgment" is "required as a predicate for federal appellate jurisdiction." *Abney, et al. v. United States*, — U.S. —, 52 L. Ed. 2d 651, 658 (1977).

The Union here is seeking an appeal from a District Court order denying its motions for summary judgment prior to trial. Obviously, such an order is not " 'final' in the sense that it terminates" the litigation, or determines anything that cannot be reviewed upon any appeal that might follow the District Court's ultimate "disposition of the merits of the" case. *Id.*, 52 L. Ed. 2d at 658, 659.

But, since the motions are based upon the Union's contention that it has a contractual right to immunity from being put to trial at all in these cases (Pet., 4, 12 n. 8), the Union claims that the present situation satisfies the conditions laid down by this Court in *Cohen, et al. v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949) for interlocutory appeals from certain types of "collateral" orders (Pet., 6).

In its argument offered in support of that claim, however, the Union has ignored what this Court recently made abundantly plain in *Abney, et al. v. United States, supra,* namely, that the exception enunciated in *Cohen* is very narrowly restricted by certain explicit conditions which must be met in terms of the particular facts of the case at hand.[1]

[1]It is indeed ironic that Petitioner, after accusing the Court of Appeals of ignoring the "application of the *Cohen* principle in *Abney* . . .", immediately launches into a blatant misapplication of selected phrases in the *Abney* opinion to purportedly parallel characteristics of the present case. As noted more fully elsewhere herein, the basic fallacy in the Union's assumption as to the exclusivity of arbitration as a means of redress for the plaintiff in these cases, and the Union's repeated mischaracterization of the "question" involved "on the merits" of plaintiff's claims, along with other errors, combine to render superficial and utterly meaningless the Petition's effort to attack the ruling below by "tracking" the reasoning in the *Abney* case (Pet., 11-12).

Hence, the Union is quite mistaken in its suggestion that the background facts of the present case are unimportant to a consideration of its Petition. For it is only by reference to pertinent factual matters, which Respondent has summarized in the Counterstatement of the case, that a proper determination can be made on whether, under the judicial authorities relied upon by the Union,[2] an interlocutory appeal should have been allowed by the Court below.

And yet, instead of presenting these factual matters to this Court in an effort to show that the essential requirements for an interlocutory appeal have actually been met, the Union merely sets forth broad conclusionary assumptions and carefully avoids mention of the pertinent, undisputed facts which totally negate those assumptions.

As example, the Union's underlying premise is that arbitration is the sole and exclusive method by which

[2]The Petition refers "particularly" to *Local 771, I.A.T.S.E., AFL-CIO v. RKO General, Inc.*, 546 F. 2d 1107 (2nd Cir. 1977) and *Abney, et al. v. United States, supra.*

resolution may be had of the issues presented in the District Court cases denominated PILOT I and II. Yet, as to PILOT I, no reference is made by the Union to the fact that, in 1972, it sought and obtained precisely the same arbitration award it now demands the right to endeavor to secure, or to the fact that such award was nullified in legal proceedings which are *res judicata* and absolutely binding upon the Union.

Thus, when viewed in the light of the real facts, this aspect of the Union's case presents a most peculiar spectacle. The ruling ultimately sought by the Union through its Petition to this Court would essentially mean that the arbitration committee, whose award was reversed in effect by the Labor Board and three federal courts, must be given an opportunity, in turn, effectually to reverse that agency and those courts.

This is not mere speculation or argument. As noted earlier, the District Court declared in 1972 that the initial award obtained by the Union was a nullity, because the committee which issued it had no interpretative authority under the contract—and the Union acquiesced in that court ruling. Despite all this, in the proceedings in the Court below, the Union argued that Pilot is barred from recovery in PILOT I because it refused to acquiesce in that "final and binding award in favor of the Union" which, even now, it says is "conclusive"!

In the leading decisions on this subject, careful consideration has been given to the nature of the right which the party seeking appeal claimed to be endangered or subject to irretrievable loss if the appeal should be denied. For example, in *Abney* it was the constitutional right of one accused of crime to be protected from being forced to suffer the perils and pain of a second trial upon charge of the same offense. 52 L. Ed. 2d at 660-662. See, *United States v. Beckerman,* 516 F. 2d 905, 906 (2nd Cir. 1975).

And in *RKO General,* it was the right to be free of the "costs and delays of trial", which the Company claimed to have gained with respect to a dispute over work assignments, under circumstances indicating the claim was "more than merely colorable", as distinguished from situations involving a "run-of-the-mill attempted piecemeal appeal from a denial of a motion to dismiss. . . ." 546 F. 2d, at 1112-1113.

In the present case, can it reasonably be said that a comparable situation exists? Or, phrased in the factual context already described, the question is, did the Union in collective bargaining gain a contract right to have an arbitrator determine whether the Union's strike was contractually permissible, though it has been judicially established that such strike had an unlawful purpose? The question carries its own answer. Yet, this is the "important" right which the Union here argues will be "irretrievably lost" if it is required to proceed to trial in the District Court.

In regard to the two national labor policies which the Union's Petition seeks to bring into conflict here, the Court of Appeals for the Fifth Circuit has already given a clear-cut answer. As noted above, that Court ruled in no uncertain terms that the parties to a collective bargaining contract cannot oust the Labor Board's exclusive jurisdiction over representation questions, or overrule the Board's superior authority in its exercise of that jurisdiction. Certainly, therefore, the Union cannot have a collateral and separable contract right to arbitration which has the purpose of intruding in that forbidden area.

It is also inconceivable that the Union could sincerely believe that the stay Order entered by the Court, and the Company's offer to dismiss, in PILOT II, have no consequential relevance on the question of whether an imminent trial poses a dire threat of unnecessary costs and irretrievably lost rights to the Union. Yet, in reproducing in its Petition for certiorari the Order from which it seeks to appeal, when the Union reached that part of the Order which halted further proceedings, it ceased copying.

Under no circumstances now conceivable will PILOT II ever be tried. That holds true whether the Court denies certiorari, or grants it and the appeal is thereafter sustained. Even if, for some unforeseen reason, PILOT II should ever be resurrected, there will be ample occasion for the Union to appeal at that time.

These facts raise an obvious question—Why is the Union pursuing the matter at this time anyway? Only one logical answer is apparent. The Union is here seeking judicial advice on how it should proceed to defend against the allegations in the PILOT III Complaint. Instead of promoting judicial economy as the Union claims, it actually is seeking a waste of judicial effort.

The Union lays great stress upon "practical necessity" and the desirability for "judicial economy" as supporting its Petition. As a practical matter, however, there is no way that granting of the Petition followed by sustaining of the Union's appeal could substantially spare the courts from judicial effort. Most obviously, PILOT I now involves a judicial and not an arbitrative issue. And the issues in PILOT III must, in any event, be tried in full in the District Court upon theories, not all of which will have direct relationship to alleged breach, or specific enforcement, of contractual obligations to arbitrate disputes.

And this leads to a final point regarding the Petitioner's claim that the ruling of the Court below is inconsistent with (Pet., 11), or in direct conflict with (Pet., 7), the decisions of another Circuit Court of Appeals and this Court's recent interpretations of 28 U.S.C. §§1291 and 1292. From what has already been noted, it is clear that there is no such conflict or inconsistency, because the fact situation in the present case is simply not comparable to the ones found in

the cases relied upon in the Petition. Much of the confusion in this regard is generated by the imprecise nature of the Union's references to the matters it contends are required by the contract to be dealt with only by an arbitration committee and hence withdrawn completely from jurisdiction of the courts.

Thus, when Petitioner asserts—as it repeatedly does—that "arbitration was the exclusive remedy under the contract", it never pauses to distinguish among the various issues that might be—and indeed in this case are—embraced in the term "remedy". It is, for example, one thing to say that the issue of whether the Union was free to strike under certain circumstances is subject to resolution in the first instance by resort to arbitration. It is quite another to say that everything Pilot seeks by way of remedy through its suits filed in the District Court for the Middle District of North Carolina is barred by contract from presentation at trial in that Court.

Obviously, the latter simply is not true—for various reasons—the most cogent one being an express reservation in the contract of the right of the parties to litigate strike damage issues in the courts. The Union, of course, was hard put to find even colorable support for its claim that Pilot is contractually required to submit such issues to arbitration. As it did with respect to facts pertinent to other issues, the Union simply avoided any reference to the explicit contractual exclusion from mandatory

arbitration of claims for damages resulting from strikes in violation of the contract.

Substantially all of the points made in the portions of the Union's Petition which are not dealt with specifically in the foregoing arguments, relate only to what might be deemed the merits of the appeal should the Union's Petition be granted and the ruling of the Court of Appeals reversed. Hence, these are necessarily matters not properly before the Court in connection with the Union's asserted reasons why a writ of certiorari should issue.

It is not inappropriate to note, however, that the factual recitations in the Petition on these matters are demonstrably unreliable as support for the Petition. As example, the Union places considerable emphasis upon the complaint allegations which plaintiff made at the interlocutory stage of the proceedings below—and in like manner digresses in its scant recitation of the procedural history of these cases in order to make particular reference to the fact that at one point the Company instituted, and then withdrew, an arbitration proceeding (Pet., 5).

These procedural undertakings of the Company constituted only a small portion of the legal proceedings participated in by both parties in the course of this protracted and complicated litigation, and were simply one aspect of the Company's effort to obtain specific enforcement of the contract requirement that the Union exhaust its contract remedies before proceeding with strike action.

It seems obvious that the Union has focused on these matters in a contrived effort to create the appearance that the Union has an unquestionable right to require that the Company's suit for damages be litigated only before an arbitrative panel. In the course of buttressing its argument, however, the Union carefully avoided mention in its Petition of the contract clauses which explicitly exclude such issues from mandatory arbitration.

By referring here to these exclusionary clauses, Pilot is not, of course, seeking a ruling by this Court that these provisions control this case in all events. Rather, the subject is raised in this response to the Petition only to point out that which is important here —namely, the extent and nature of selectivity the Union employed in determining which facts it would bring to the Court's attention and which facts it would ignore—as bearing on the overall reliability of the assertions made in the Petition.

III. Conclusion

Upon all of the foregoing, Pilot Freight Carriers, Inc. earnestly contends that a Writ of Certiorari should not be granted in this case.

Respectfully submitted,

WHITEFORD S. BLAKENEY
J. W. ALEXANDER, JR.
Attorneys for Pilot Freight Carriers, Inc.

APPENDIX

APPENDIX A

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF NORTH CAROLINA
WINSTON-SALEM DIVISION

PILOT FREIGHT CARRIERS v. LOCAL 391, IBT, et al.	Civil Action Nos. C-215-WS-72 C-219-WS-72 C-74-69-WS C-75-76-WS

MEMORANDUM

This matter was scheduled for hearing on all pending motions in the United States Courtroom, United States Courthouse and Federal Building, Winston-Salem, North Carolina, January 13, 1977. William K. Davis, Esq., J. W. Alexander, Jr., Esq., and John Pollard, Esq., appeared as counsel for the plaintiff. Robert Higgins, Esq., Ira Mitzner, Esq., Renn Drum, Esq., Jonathan Axelrod, Esq., Hugh Beins, Esq., and Norman B. Smith, Esq., appeared as counsel for the defendants.

The several motions before the Court are resolved as follows:

I. In C-219-WS-72, Pilot v. International Brotherhood of Teamsters, Chauffeurs, Warehousemen, and Helpers of America, the union's motion for summary judgment is denied. The union asserts that the National Master Freight Agreement requires arbitration of all questions prior to the pursuit of any court action

against the union. This Court recognizes the broad national policy favoring arbitration emphasized by the Supreme Court in Drake Bakeries v. Local 50, American Bakery & Confectionary Workers International, AFL-CIO, 370 U.S. 254, 8 L.Ed.2d 474, 82 S.Ct. 1346 (1962), and by the Fourth Circuit in H. K. Porter Co. v. Local 37, United Steelworkers of America, 400 F.2d 691 (4th Cir. 1968).

In *H. K. Porter* the Fourth Circuit said "The obligation to arbitrate must be found in the collective bargaining agreement. It is a matter of contract, and in the absence of agreement, a party cannot be required to submit a dispute to arbitration (citation omitted). But in construing the contract, doubts must be resolved in favor of arbitration." In the present case the Court has no doubts to be resolved in favor of arbitration.

Article 8(a) of the National Master Freight Agreement requires "All grievances or questions of interpretation arising under this Master Agreement . . ." to be submitted to arbitration. That language is not nearly so broad as the contract provisions in *Drake Bakeries, supra,* or *H. K. Porter, supra.* The contract in *Drake Bakeries* required arbitration of "all complaints, all disputes, and all grievances . . . or any conduct of either party." The contract in *H. K. Porter* calls for the arbitration of "any grievance or disagreement which cannot be settled between the Employer and the Union . . ."

Moreover the explicit wording of the National Master Freight Agreement excludes this claim for damages from arbitration. In outlining the arbitration process the agreement establishes procedures for settling disputes concerning "unauthorized" strikes. The strike in question, however, is admittedly an authorized strike. A procedure to be followed in handling authorized strikes is conspicuously absent. The contract reserves the rights of both parties to seek judicial relief in other situations by stating "Nothing herein shall prevent the Employer or Union from securing remedies granted by law except as specifically set forth in this subsection." Therefore, the closing statement specifically reserves the right of Pilot to seek legal relief in the way of damages for an authorized strike.

II. In C-74-69-WS, Pilot v. Local 31, International Brotherhood of Teamsters, et al., the defendant International's motion to dismiss or alternatively to stay proceedings pending arbitration and the defendant International's motion for summary judgment are likewise denied. The Court is fully aware that the National Master Freight Agreement in force at the time of the 1974 strike differs from the contract which was in issue in the preceding motion. In addition to having language similar to the contract provisions discussed in the previous motion, the 1973-1976 agreement contains even more explicit language removing this matter from the type of dispute which is to be arbitrated.

Article 44 of the 1973 to 1976 agreement provides that "there shall be no strike without using all possible means for settlement. . . ." Following a description of the procedure to be utilized to settle grievances which are arbitrated, the agreement expressly provides that "nothing herein shall prevent legal proceedings by the Employer where the strike is in violation of this Agreement." Therefore, if the union strikes without first resorting to arbitration, as in the present case, the arbitration requirement is negated and the contract specifically allows the employer to seek legal relief. Therefore, all of the defendant IBT's motions for arbitration are denied.

III. In C-74-69-WS the plaintiff's motion to stay proceedings pending resolution of C-75-76-WS is granted. C-75-76-WS contains all the claims the plaintiff has presented in this action and, therefore, the Court feels economy can be fostered by staying C-74-69-WS at this time. The Court finds that Local 391, a defendant in C-74-69-WS but not in C-75-76-WS, is not prejudiced by this ruling.

IV. In view of the stay granted in C-74-69-WS, the Court specifically declines to rule on Local 391's motion for summary judgment in that case but prefers to await the termination of C-75-76-WS.

Remaining portions of this Memorandum Order pertaining to discovery matters in case number C-75-76-WS have been omitted.

APPENDIX B

PERTINENT PORTIONS OF THE NATIONAL MASTER FREIGHT AGREEMENT FOR THE PERIOD APRIL 1, 1970 THROUGH JUNE 30, 1973

ARTICLE 8.

National Grievance Procedure

(a) All grievances or questions of interpretations arising under this Master Agreement or Supplemental Agreements thereto shall be processed as set forth below. If such Supplemental Agreements provide for arbitration of discharges, such procedure shall be continued.

* * *

8A(3)

Work Stoppages

(a) It is mutually agreed that the Local Union will, within two weeks of the date of the signing of this Agreement, serve upon the Employer a written notice listing the Union's authorized representatives who will deal with the Employer, make commitments for the Local Union generally and, in particular, those individuals having the sole authority to act for the Local Union in calling or instituting strikes or any stoppages of work which are not in violation of this Agreement. The Local Union may from time to time amend its

listing of authorized representatives by certified mail. It is further agreed that in all cases of an unauthorized strike, slowdown, walkout, or any unauthorized cessation of work in violation of this Agreement the Local Union shall not be liable for damages resulting from such unauthorized acts of its members.

In the event of a work stoppage, slowdown, walkout, or cessation of work in violation of this Agreement, the Employer shall immediately send a wire to the appropriate Area Conference to determine if such strike, etc. is authorized. No strike, slowdown, walkout or cessation of work in violation of this Agreement shall be deemed to be authorized unless notification thereof by telegram has been received by the Employer and Local Union from such Area Conference. If no response is received by the Employer within twenty-four (24) hours after request, excluding Saturday, Sunday and holidays, such strike, etc. in violation of this Agreement shall be deemed to be unauthorized by the Area Conference for the purposes of this Agreement.

In the event of an unauthorized work stoppage or picket line, etc., in violation of this Agreement, the Local Union shall immediately make every effort to persuade the employees to commence the full performance of their duties and shall immediately inform the employees that the work

stoppages and/or picket line is unauthorized and in violation of this Agreement. The question of whether employees who refuse to work during such unauthorized work stoppages, in violation of this Agreement, or who fail to cross unauthorized picket lines at their Employer's premises shall be considered as participating in an unauthorized work stoppage in violation of this Agreement, may be submitted to the grievance procedure, but not the amount of suspensions herein referred to.

It is specifically understood and agreed that the Employer, during the first twenty-four (24) hour period of such unauthorized work stoppage in violation of this Agreement, shall have the sole and complete right of reasonable discipline, including suspension from employment, up to and including thirty (30) days, but short of discharge, and such employees shall not be entitled to or have any recourse to the grievance procedure. In addition, it is agreed between the parties that if any employee repeats any such unauthorized strike, etc., in violation of this Agreement, during the term of this Agreement, the Employer shall have the right to further discipline or discharge such employee without recourse for such repetition. After the first twenty-four (24) hour period of an unauthorized stoppage in violation of this Agreement, and if such stoppage continues, the Employer shall have the

sole and complete right to immediately further discipline or discharge any employee participating in any unauthorized strike, slowdown, walkout, or any other cessation of work in violation of this Agreement, and such employees shall not be entitled to or have any recourse to the grievance procedure. The suspension or discharge herein referred to shall be uniformly applied to all employees participating in such unauthorized activity. The Employer shall have the sole right to schedule the employees' period of suspension.

The International Brotherhood of Teamsters, the Area Conference, and Local Union shall make immediate efforts to terminate any strike or stoppage of work as aforesaid, which is not authorized by such organizations, without assuming liability therefor. It is understood and agreed that failure by the International Brotherhood of Teamsters and/or the Area Conference to authorize a strike by a Local Union shall not relieve such Local Union of liability for a strike authorized by it and which is in violation of this Agreement.

(b) The question of whether the International Union, an Area Conference, or a Local Union, separately or jointly, participated in an unauthorized work stoppage, slowdown, walkout or cessation of work in violation of this Agreement by calling, encouraging, assisting or aiding in such stoppage, etc., in violation of this Agree-

ment, or whether an Employer engaged in a lockout in violation of this Agreement, shall be submitted to the grievance procedure at the national level, prior to the institution of any damage suit action. When requested, the Co-Chairmen of the National Grievance Committee shall immediately appoint a sub-committee to develop a record by collecting evidence and hear testimony, if any, on the sole question of Union participation or Employer lockout in violation of this Agreement. The record shall be immediately forwarded to the National Grievance Committee for decision. If a decision is not rendered within thirty (30) days after the Co-Chairmen have convened the National Committee, the matter shall be considered deadlocked.

A majority decision of the National Grievance Committee on the question of Union participation or Employer lockout in violation of this Agreement shall be final and binding on all parties. If such majority decision is rendered in favor of one or more of the Union entities, or the Employer, in the case of lockout, no damage suit proceedings on the issues set forth in this Article shall be instituted against such Union entity or such Employer. If, however, the National Grievance Committee is deadlocked on the issues referred to in this subsection 3 (b), either party may institute damage suit proceedings but the

record of the National Grievance Committee and its Subcommittee shall not be offered in evidence by either party for any purpose. Except as provided in this subsection 3 (b), agreement to utilize this procedure shall not thereafter in any way limit or constitute a waiver of the right of the Employer or Union to commence damage suit action. However, the use of evidence in this procedure shall not waive the right of the Employer or Union to use such evidence in any litigation relating to the strike or lockout, etc. in violation of this Agreement.

There shall not be any strike, slowdown, walkout, cessation of work or lockout as a result of a deadlock of the National Grievance Committee on the questions referred to under this subsection 3 (b), and any such activity shall be considered a violation of this Agreement.

Nothing herein shall prevent the Employer or Union from securing remedies granted by law except as specifically set forth in this subsection 3 (b).

APPENDIX C

PERTINENT PORTIONS OF THE
NATIONAL MASTER FREIGHT AGREEMENT
AND
OVER-THE-ROAD
SUPPLEMENTAL AGREEMENT
FOR THE PERIOD
JULY 1, 1973 TO MARCH 31, 1976

ARTICLE 8.

National Grievance Procedure

Section 1.

All grievances or questions of interpretations arising under this Master Agreement or Supplemental Agreements thereto shall be processed as set forth below. If such Supplemental Agreements provide for arbitration of discharges, such procedure shall be continued.

* * *

Section 2.

Work Stoppages

(a) It is mutually agreed that the Local Union will, within two weeks of the date of the signing of this Agreement, serve upon the Employer a written notice listing the Union's authorized representatives who will deal with the Employer, make commitments for the Local Union generally and, in particular, those individuals having the sole authority to act for the Local Union in calling or

instituting strikes or any stoppages of work which are not in violation of this Agreement. The Local Union may from time to time amend its listing of authorized representatives by certified mail. It is further agreed that in all cases of an unauthorized strike, slowdown, walkout, or any unauthorized cessation of work in violation of this Agreement the Local Union shall not be liable for damages resulting from such unauthorized acts of its members.

In the event of a work stoppage, slowdown, walkout, or cessation of work in violation of this Agreement, the Employer shall immediately send a wire to the appropriate Area Conference to determine if such strike, etc. is authorized. No strike, slowdown, walkout or cessation of work in violation of this Agreement shall be deemed to be authorized unless notification thereof by telegram has been received by the Employer and Local Union from such Area Conference. If no response is received by the Employer within twenty-four (24) hours after request, excluding Saturday, Sunday and holidays, such strike, etc. in violation of this Agreement shall be deemed to be unauthorized by the Area Conference for the purposes of this Agreement.

In the event of an unauthorized work stoppage or picket line etc., in violation of this Agreement, the Local Union shall immediately make every

effort to persuade the employees to commence the full performance of their duties and shall immediately inform the employees that the work stoppage and/or picket line is unauthorized and in violation of this Agreement. The question of whether employees who refuse to work during such unauthorized work stoppages, in violation of this Agreement, or who fail to cross unauthorized picket lines at their Employer's premises shall be considered as participating in an unauthorized work stoppage in violation of this Agreement, may be submitted to the grievance procedure, but not the amount of suspensions herein referred to.

It is specifically understood and agreed that the Employer, during the first twenty-four (24) hour period of such unauthorized work stoppage in violation of this Agreement, shall have the sole and complete right of reasonable discipline, including suspension from employment, up to and including thirty (30) days, but short of discharge, and such employees shall not be entitled to or have any recourse to the grievance procedure. In addition, it is agreed between the parties that if any employee repeats any such unauthorized strike, etc., in violation of this Agreement, during the term of this Agreement, the Employer shall have the right to further discipline or discharge such employee without recourse for such repetition. After the first twenty-four (24) hour

period of an unauthorized stoppage in violation of this Agreement, and if such stoppage continues, the Employer shall have the sole and complete right to immediately further discipline or discharge any employee participating in any unauthorized strike, slowdown, walkout, or any other cessation of work in violation of this Agreement, and such employees shall not be entitled to or have any recourse to the grievance procedure. The suspension or discharge herein referred to shall be uniformly applied to all employees participating in such unauthorized activity. The Employer shall have the sole right to schedule the employees' period of suspension.

The International Brotherhood of Teamsters, Teamsters National Freight Industry Negotiating Committee, Area Conferences, Joint Councils and Local Unions shall make immediate efforts to terminate any strike or stoppage of work as aforesaid which is not authorized by such organizations, without assuming liability therefor. For and in consideration of the agreement of the International Brotherhood of Teamsters, Teamsters National Freight Industry Negotiating Committee, Area Conferences, and Joint Councils affiliated with the International Brotherhood of Teamsters to make the aforesaid efforts including the use of all reasonable means at their disposal to require Local Unions and their members to comply with the law or the pro-

visions of this Agreement, including the provisions limiting strikes, work stoppages, as aforesaid, the Associations and Employers who are parties hereto agree that they will not hold the International Brotherhood of Teamsters, Teamsters National Freight Industry Negotiating Committee, Area Conferences, or Joint Councils liable or sue them in any court or before any administrative tribunal for undertaking such efforts to terminate unauthorized strikes or stoppages of work as aforesaid or for undertaking such efforts to require Local Unions and their members to comply with the law or the provisions of this Agreement. It is further agreed that signator associations and Employers will not hold the International Brotherhood of Teamsters, Teamsters National Freight Industry Negotiating Committee, Area Conferences or Joint Councils liable or sue them in any court or before any administrative tribunal for such unauthorized work stoppages alleging condonation, ratification or assumption of liability for undertaking such efforts to terminate strikes or stoppages of work or requiring Local Unions and their members to comply with the law or the provisions of this Agreement.

The provisions of this Article shall continue to apply during that period of time between the expiration of this Agreement and the conclusion of the negotiations or the effective date of the

successor Agreement, whichever occurs later. It is understood and agreed that failure by the International Brotherhood of Teamsters, Teamsters National Freight Industry Negotiating Committee, Area Conferences and/or the Joint Councils to authorize a strike by a Local Union shall not relieve such Local Union of liability for a strike authorized by it and which is in violation of this Agreement.

(b) The question of whether the International Union, Teamsters National Freight Industry Negotiating Committee, an Area Conference, Joint Council or Local Union have met their obligation set forth in the immediately preceding paragragh or the question of whether the International Union, Teamsters National Freight Industry Negotiating Committee, an Area Conference, Joint Council or the Local Union, separately or jointly, participated in an unauthorized work stoppage, slowdown, walkout or cessation of work in violation of the Agreement by calling, encouraging, assisting or aiding in such stoppage, etc., in violation of this Agreement, or whether an Employer engaged in a lockout in violation of this Agreement shall be submitted to the grievance procedure at the national level, prior to the institution of any damage suit action. When requested, the Co-Chairmen of the National Grievance Committee shall immediately appoint a subcommittee to develop a record by collecting evidence

and hear testimony, if any, on the sole question of whether the International Union, Teamsters National Freight Industry Negotiating Committee, an Area Conference, Joint Council or Local Unions have met their obligation as aforesaid or of Union participation or Employer lockout in violation of this Agreement. The record shall be immediately forwarded to the National Grievance Committee for decision. If a decision is not rendered within thirty (30) days after the Co-Chairmen have convened the National Committee, the matter shall be considered deadlocked.

A majority decision of the National Grievance Committee on the questions presented as aforesaid shall be final and binding on all parties. If such majority decision is rendered in favor of one or more of the Union entities, or the Employer, in the case of lockout, no damage suit proceedings on the issues set forth in this Article shall be instituted against such Union entity or such Employer. If, however, the National Grievance Committee is deadlocked on the issues referred to in this subsection 2 (b), either party may institute damage suit proceedings, but the record of the National Grievance Committee and its Subcommittees shall not be offered in evidence by either party for any purpose. Except as provided in this subsection 2 (b), agreement to utilize this procedure shall not thereafter in any way limit or constitute a waiver of the right of

the Employer or Union to commence damage suit action. However, the use of evidence in this procedure shall not waive the right of the Employer or Union to use such evidence in any litigation relating to the strike or lockout, etc., in violation of this Agreement. There shall not be any strike, slowdown, walkout, cessation of work or lockout as a result of a deadlock of the National Grievance Committee on the questions referred to under this subsection 2 (b), and any such activity shall be considered a violation of this Agreement.

Nothing herein shall prevent the Employer or Union from securing remedies granted by law except as specifically set forth in this subsection 2 (b).

* * *

ARTICLE 44

Grievance Machinery and Union Liability

* * *

Section 1.

* * *

(f) In the event of strikes, work stoppages or other activities which are permitted in case of deadlock, default or failure to comply with majority decisions, no interpretation of this Agreement by any tribunal shall be binding upon the Union or affect the legality or lawfulness of the strike unless the Union stipulates to be bound by such

interpretation, it being the intention of the parties to resolve all questions of interpretations by mutual agreement. Nothing herein shall prevent legal proceedings by the Employer where the strike is in violation of this Agreement.

* * *

APPENDIX D

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF NORTH CAROLINA
WINSTON-SALEM DIVISION

PILOT FREIGHT CARRIERS, INC.,
Plaintiff,

vs.

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA,
Defendant.

Civil Action No. C-75-76-W.S.

COMPLAINT

The plaintiff, complaining of the defendant, alleges and says:

CAPACITY, JURISDICTION AND VENUE

1. The plaintiff, Pilot Freight Carriers, Inc., is a common carrier of general commodity freight operating across various state lines along the Eastern seaboard of the United States between Florida and the Canadian border under certificates of convenience and necessity issued by the Interstate Commerce Commission and is an employer within the meaning of Section 2(2) of the National Labor Relations Act [29 U.S.C.§152(2)]. The plaintiff is engaged in interstate commerce within the meaning of Section 2(6) of that Act [29 U.S.C.§152(6)].

2. The plaintiff is a North Carolina corporation which maintains offices and its principal place of business in Forsyth County in that State.

3. The defendant is an unincorporated labor organization, or "union", whose principal office and place of business is located in Washington, D. C. The defendant is engaged in the business of representing employees in collective bargaining with their employers and in transacting business incidental, or related, thereto. The defendant is a labor organization within the meaning of Section 2(5) of the National Labor Relations Act [29 U.S.C. §152(5)].

4. At all times material to this action, the defendant has transacted, and it now transacts, in the State of North Carolina, the business for which it was formed and exists. The injuries complained of herein were tortiously inflicted upon the plaintiff by the defendant acting both within the State of North Carolina and in other locations.

5. Jurisdiction of the parties and subject matter is conferred upon the Court by 29 U.S.C. §185 and §187(b) and by 28 U.S.C. §1331. Venue in this Court is proper, as established by 29 U.S.C. §185(c).

COUNT I

6. The plaintiff derives its revenues and profits from handling and transportation of freight, moving both directly from origin to destination along the plaintiff's lines and from freight interchanged with

connecting common carriers which is transported part of the way from origin to destination by the plaintiff and part of the way by such connecting carriers.

7. At all times material to this action, the defendant, acting by and through its subordinate bodies, has represented employees of the plaintiff in various bargaining units throughout the plaintiff's system from Georgia to the Canadian border. The plaintiff and defendant, by and through numerous of its subordinate bodies, have been parties to the National Master Freight Agreement which has been in effect throughout the majority of the trucking industry nationwide, and to various area supplemental agreements.

8. Each of said contracts contains a mandatory procedure which requires that all grievances or questions of interpretation arising under such agreement must be resolved by grievance committees established thereunder. According to each agreement, majority decisions by such grievance committees are final and binding on all parties.

9. Each of said contracts provides that there shall be no strike or tie-up of the plaintiff's business without prior exhaustion of all possible means of settlement provided for therein.

10. The said contracts also contained a clause which provided that it would not be a violation thereof or cause for disciplinary action for an employee

individually to refuse to go through or work behind a primary picket line.

11. The question of whether the defendant was free, in spite of the contract clause referred to in paragraph 9 above, to induce, encourage, finance, foster or order its members who were employees of the plaintiff to refuse to cross picket lines at the plaintiff's terminals was subject to the mandatory grievance and arbitration provisions in said contracts.

12. On or about February 26, 1974 and continuing for a period of approximately six months thereafter, the defendant, acting through one of its local unions, authorized and financed the establishment and maintenance of picket lines at the plaintiff's terminals through its system and, without resorting to the grievance and arbitration procedures referred to above, induced, encouraged, financed, fostered and ordered its members who were employees of the plaintiff to refuse to cross such picket lines.

13. The defendant's strike against the plaintiff was in direct, deliberate and intentional violation of its obligation to submit all disputes to the mandatory grievance or arbitration procedures set forth in said contracts.

14. The actions of the defendant hereinabove described were undertaken for the wilful, deliberate and malicious purpose of injuring and damaging the plaintiff and destroying its business.

15. As a direct and proximate result of the defendant's actions, herein described, the plaintiff has been shut off and deprived of freight business which it would otherwise have handled profitably; the plaintiff has been required to pay out large sums of money for extraordinary expenses incurred by it in an effort to secure, handle and transport freight and otherwise operate its business in spite of said strike; the plaintiff's customers have been driven away and lost; the plaintiff has been deprived of the services of employees who were willing to work in spite of said strike and of the use and benefit of its terminals and equipment; and the plaintiff suffered practically a complete destruction of its otherwise profitable business.

16. By reason of the unlawful actions of the defendant described above, the plaintiff has suffered and will continue to suffer actual damages in the sum of Twelve Million Five Hundred Thousand and no/100 ($12,500,000.00) Dollars.

COUNT II

17. The plaintiff repeats and realleges all of the allegations contained in paragraphs 1 through 7 of this Complaint.

18. By each of said contracts, the defendant was absolutely prohibited from calling, financing, authorizing, condoning or supporting a strike against the plaintiff during the contract term.

19. On or about February 26, 1974 and continuing for a period of approximately six months thereafter,

the defendant did call, maintain, supervise, control, direct and support a system wide strike against the plaintiff in violation of its contractual obligation not to do so.

20. As a direct and proximate result of said strike by the defendant, the plaintiff has been injured and damaged as is set forth in paragraphs 15 and 16 of this Complaint.

COUNT III

21. The plaintiff repeats and realleges all of the allegations contained in paragraphs 1 through 6 and 10 of this Complaint.

22. Immediately upon calling its strike, and throughout the duration thereof, the defendant union through its representatives, agents, members and sympathizers, acting for and with the approval of or ratification by the defendant, actively and concertedly engaged in violence, threats, intimidation, unlawful secondary boycotting and related conduct designed to destroy the plaintiff's business. During said period, the defendant among other things unlawfully:

(a) Coerced, threatened, intimidated, viciously assaulted and attempted to murder non-striking employees and other persons seeking to transact business with the plaintiff; and smashed, rammed, sabotaged and otherwise damaged motor vehicles and other property belonging to said employees, all

for the purposes of denying the plaintiff its right to transact business with them.

(b) Repeatedly slashed and deflated tires, smashed windshields, sabotaged braking systems and otherwise seriously damaged the plaintiff's rolling equipment and other property.

(c) Induced, threatened, coerced and intimidated the plaintiff's customers, consignees and connecting carriers into refusing to deliver to, ship by, or receive from the plaintiff freight which the plaintiff would have transported except for the defendant's wrongful and unlawful actions.

(d) Induced, encouraged, coerced and initimidated employees of the plaintiff's customers, consignees and connecting carriers to engage in concerted refusals in the course of their employment to transport or otherwise handle any goods, articles, materials or commodities going to or coming from the plaintiff for the purpose of forcing or requiring said customers, consignees and trucking companies to cease doing business with the plaintiff.

(e) Set up bands of roving pickets to follow plaintiff's vehicles throughout its system and, in the course thereof, forced vehicles off the public highways, blocked their entrance into the premises of customers, consignees and connecting carriers and caused employees of these concerns to join in such unlawful conduct.

23. The actions of the defendant hereinabove described were wrongful and in violation of law and were taken by the defendant for the wilful, deliberate and malicious purpose of injuring and damaging the plaintiff and destroying its business.

24. As a direct and proximate result of the matters herein alleged, the plaintiff has been injured and damaged as is set forth in paragraphs 15 and 16 of this Complaint.

25. In consequence of its wilful and malicious conduct described in paragraph 22, sub-paragraphs (a), (b) and (e), the defendant should be assessed with punitive and exemplary damages in the sum of Twelve Million Five Hundred Thousand and no/100 ($12,500,000.00) Dollars.

COUNT IV

26. The plaintiff repeats and realleges all the allegations contained in paragraphs 1 through 6 of this Complaint.

27. On or about the 26th day of February, 1974 and continuing for approximately six months thereafter, the defendant picketed or caused to be picketed, plaintiff's terminals throughout its system, where an object thereof was to force or require the plaintiff to recognize or bargain with the defendant, or one of its subordinate bodies, as the bargaining representative of employees performing freight transportation services at the plaintiff's Jacksonville, Florida terminal

even though neither the defendant nor any of its subordinate bodies had been certified as such bargaining agent, all in violation of law.

28. As a result of the matters herein alleged, the plaintiff has been injured and damaged as is set forth in paragraphs 15 and 16 of this Complaint.

WHEREFORE, the plaintiff prays the Court:

(1) That it have and recover from the defendant the sum of Twelve Million Five Hundred Thousand and no/100 ($12,500,000.00) Dollars actual damages and Twelve Million Five Hundred Thousand and no/100 ($12,500,000.00) Dollars punitive or exemplary damages;

(2) That the plaintiff recover its costs;

(3) That the issues hereinabove set forth be tried by a jury; and

(4) That the plaintiff have such other and further relief as the Court deems just and proper.

WILLIAM KEARNS DAVIS
DEAL, HUTCHINS AND MINOR
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Winston-Salem, North Carolina 27102

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BLAKENEY, ALEXANDER AND MACHEN
3450 NCNB Plaza
Charlotte, North Carolina 28280

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF
NORTH CAROLINA
WINSTON-SALEM DIVISION

PILOT FREIGHT CARRIERS, INC.,
Plaintiff,
v.
LOCAL 391, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, et al,
Defendants.

Civil Action No. C-74-69-WS

MOTION TO STAY PROCEEDINGS

Upon the grounds and for the reasons hereinafter stated, the plaintiff, Pilot Freight Carriers, Inc., hereby moves the Court that an order be entered staying all proceedings in this case pending further orders of the Court.

The facts which gave rise to the complaint and controversies herein are the subject of another action which is pending in this Court, entitled "Pilot Freight Carriers, Inc. v. International Brotherhood of Teamsters, etc.", Civil Action No. C-75-76-WS. With the exception of one outstanding Order in which the Court requires the defendants to show cause, if any they

have, why they should not be adjudged in contempt of court, all of the untried issues in this case are also raised in the 1975 damage action.

If the plaintiff recovers in the 1975 damage action, all issues in this case will become moot with the exception of a citation for criminal contempt which could yet be issued herein against the defendants. The 1975 damage action involves a number of claims which cannot be tried in this case.

Accordingly, no useful purpose can be served by proceeding in this case. On the other hand, to proceed now would risk an unnecessary duplication of the Court's time dealing with the same controversy.

WHEREFORE, the plaintiff prays that an order issue herein staying all proceedings in this case.

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Attorneys for Plaintiff,
Pilot Freight Carriers, Inc.

Supreme Court, U. S.
FILED
DEC 30 1977
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-619

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA,
Petitioner

v.

PILOT FREIGHT CARRIERS, INC.,
Respondent

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

---

PETITIONER'S REPLY MEMORANDUM

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Of Counsel:

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WILSON - EPES PRINTING CO., INC. - RE 7-6002 - WASHINGTON, D.C. 20001

IN THE

Supreme Court of the United States

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---

PETITIONER'S REPLY MEMORANDUM

Duly mindful of the admonition of Rule 23(4) ("The failure of a petitioner to present with accuracy, brevity, and clearness whatever is essential to a ready and adequate understanding of the points requiring consideration will be a sufficient reason for denying his petition"), the Petition took pains to confine its description of the facts and argument to matters immediately relevant to the only question presented by the Petition—whether the denial of a motion to dismiss a suit for breach of contract is an order appealable, under 28 U.S.C. § 1291, where the basis

of the motion was that the agreement requires arbitration of the question of breach. Respondent, apparently hopeful that a Petition will be denied if the *Brief in Opposition* confuses matters by contravening the Rule 23(4) standards, faults us for this and discourses at length on 1) the merits of the District Court's decision of non-arbitrability (the issue which we wish the Court of Appeals to decide); 2) the merits of Pilot's breach of contract claim (the issue which we contend is arbitrable); and 3) the rights and wrongs of the underlying strikes. But Pilot does not dispute the soundness of the Second Circuit decision on which we rely (Pet. 7-10), or the public importance of the issue (Pet. 13).

1. The merits of the appeal which the court below dismissed are presently relevant only insofar as the Second Circuit's opinion in *Local 771, I.A.T.S.E., AFL-CIO* v. *RKO General, Inc.*, 546 F.2d 1107 (C.A. 2) implicitly requires the appellant to show that it has a "more than merely colorable" argument that the appellee's breach-of-contract claim is arbitrable. *Id.* at 1112. The Petition demonstrated that the issue of arbitrability was far more than merely "colorable": We pointed out that respondent's own complaints alleged that the contracts "contain[] a grievance procedure established for the purposes of resolving all disputes between the parties involving the application and interpretation of such agreement." (Pet. 3, text and note at note 1); and we quoted the trial court's certification:

> "In all fairness the defendants have put forward controlling legal questions to which substantial grounds for a difference of opinion exists." (Pet. 6, note 4, cont.)

We also quoted the opinion of the Court of Appeals at a prior stage of *Pilot II*:

> "The National Master Freight Agreement in the present case does have a mandatory grievance procedure (Article 3) regarding any dispute under the contract." (Pet. 4, note 2, cont.)

As there is no material difference between the arbitration provisions of the two agreements, that holding establishes at a minimum, the substantiality of our position that respondent's breach of contract claims in both *Pilot II* and *Pilot I* are arbitrable.[1]

2. With respect to *Pilot I*, respondent makes an additional argument of insubstantiality which is of interest chiefly in that it evidences the untrustworthiness of Pilot's representations as to what are "the pertinent, undisputed facts", and "the real facts" (Opp. 11-12). Respondent asserts:

> "And yet, instead of presenting these factual matters to this Court in an effort to show that the essential requirements for an interlocutory appeal have actually been met, the Union merely sets forth broad conclusionary assumptions and carefully avoids mention of the pertinent, undisputed facts which totally negate those assumptions.
>
> As example, the Union's underlying premise is that arbitration is the sole and exclusive method by which resolution may be had of the issues presented in the

---

[1] While we take exception generally to respondent's false charges and misstatements (only some of which are discussed herein), we particularly resent the allegation that we concealed the language of the agreements (Opp. 9, 16-17, 18). Since only *appealability* is before this Court, we would have been subject to criticism if we had sought to smuggle in the merits of the appeal, beyond showing, as *RKO General* implicitly requires, that the issue of arbitrability is not insubstantial. Given Pilot's contentions, however, we are constrained to assert in self-defense 1) that it has been settled since *Steelworkers* v. *Warrior & Gulf*, 363 U.S. 574, that even broad exclusionary language does not compel a conclusion that a dispute seemingly within the exclusion is non-arbitrable and 2) that there is a "substantial ground for a difference of opinion" as to the meaning and application of the language on which Pilot relies (Opp. 9)—as the District Court expressly acknowledged in its certification.

District Court cases demonimated PILOT I and II. Yet, as to PILOT I, no reference is made by the Union to the fact that, in 1972, it sought and obtained precisely the same arbitration award it now demands the right to endeavor to secure, or to the fact that such award was nullified in legal proceedings which are *res judicata* and absolutely binding upon the Union.

Thus, when viewed in the light of the real facts, this aspect of the Union's case presents a most peculier spectacle. The ruling ultimately sought by the Union through its Petition to this Court would essentially mean that the arbitration committee, whose award was reversed in effect by the Labor Board and three federal courts, must be given an opportunity, in turn, effectually to reverse that agency and those courts." (Opp. 11-12).

But it is *not* a "fact" that the arbitration award which the Union obtained in 1972 in *Pilot I* was "the same" as that which "it now demands the right to endeavor to secure", and "which was nullified in [prior] legal proceedings." The 1972 award was on *a union* grievance that *Pilot had breached the agreement* by failing to extend to its new Florida operation (see Opp. 2); there was no award on the Company's present claim that Petitioner had breached the agreement by striking. The reasons the Board and the courts gave for disapproving the award establish nothing with respect to Pilot's breach of contract claim. An unfair labor practice is not *per se* a breach of contract, and the District Court demonstrated its own view that its prior ruling in *Pilot I* was not dispositive by certifying that the issue of arbitrability was substantial and that a prompt appellate disposition thereof would expedite this litigation.[2] Accordingly, there is

[2] Actually, there were two identical awards. The original award was made by the Southern Conference Committee and was set aside by the District Court on the ground that only the National Committee had jurisdiction. (Opp. 3-4). Thereupon the union's grievance was heard anew by the National Committee and again sustained. But the NLRB determined that it would be an unfair labor practice to enforce the award because it was not a proper accretion to the original unit (Opp. 4-6). The Fifth Circuit decision which is quoted at Opp. 4-5 sustained an injunction under § 10(j) of the NLRA, 29 U.S.C. § 160(j), against enforcing or striking to enforce the award pending the Board's disposition of the unfair labor practice charge; the Court expressly stated that "these unfair labor practice charges are complex and to some degree novel, and nothing in this opinion should be read as a pre-judgment of these issues by the Court." *Boire* v. *International Brotherhood of Teamsters, Etc.*, 479 F.2d 778, 803 (C.A. 5.)

no basis whatsoever for the respondents' assertion: "Most obviously, *Pilot I* involves a judicial and not an arbitrative issue." (Opp. 15)

3. With respect to *Pilot II*, Respondent also relies on the District Court's stay of that action pending completion of *Pilot III* which combines the same breach of contract claim with tort claims of violence and illegal secondary boycotting.[3] But despite plaintiff's strategy of first bringing *Pilot II* and then seeking to dismiss that action on its own terms (Opp. 7-8), *Pilot II* remains viable, and the District Court, after granting the stay, itself certified:

Respondent asserts that the strike in *Pilot II* was a continuation of the strike in *Pilot I*, the innuendo being that it was undertaken for an illegal objective. (Opp. 6) Actually, the NLRB has determined that the Company had engaged in "pervasive and outrageous" conduct and that the union was engaged in an unfair labor practice strike. *Pilot Freight Carriers, Inc.*, 223 NLRB 286, 306. While this does not remotely bear on the issue of appealability, it is further evidence that respondent's version of the "facts" cannot be relied upon.

[3] Here again Pilot makes a wholly unwarranted charge of concealment. (Opp. 14). We did not reproduce the stay orders because these were not the orders whose finality is the issue here. For the same reason we did not reproduce the simultaneous order regarding discovery (which respondent likewise omits (Opp. 4a)), although it would have further demonstrated the complexity of the trials which arbitration would avoid, and thus would have lent additional support to our position that the order refusing to dismiss the complaint is appealable under the *Cohen* standards, see Pet. 10.

> "Should the controlling law be otherwise than interpreted by this Court there is no doubt but that time and effort will be spared." (Pet. 6, note 4, cont.)

It so certified doubtless because it recognized that if the Court of Appeals reversed its decision on arbitrability in *Pilot I* and *Pilot II* this would not only terminate those actions, but would also sharply circumscribe the issues in *Pilot III* as well. The contention that the question of appealability raised by the Petition is academic as to *Pilot II*, is therefore without merit; and no such contention is even advanced as to *Pilot I*, which raises the identical question.

4. Although it charges that "the factual recitations in the Petition * * * are demonstrably unreliable" (Opp. 17) respondent *admits* that it made the "complaint allegations", which we described at Pet. 3 (that all disputes under the contract are subject to the contractual grievance procedure) and also that "at one point the Company instituted, and then withdrew, an arbitration proceeding" (Opp. 17, referring to Pet. 5). Respondent characterizes its actions as "procedural undertakings of the Company" which were "simply one aspect of the Company's effort to obtain specific enforcement of the contract requirement that the Union exhaust its contract remedies before proceeding with strike action." (*Id.*) While the Company undoubtedly did what it did in order to obtain an advantage, that in no way detracts from the legal consequences—specifically, as we also argued in the District Court, (see Pet. 4-5), that Pilot may not deny that the NMFA requires it to arbitrate its breach of contract claims against the Union,[4] and that it was bound by its voluntary submission

[4] Indeed, the Company's very success in obtaining injunctions is all the more reason why, under the doctrine of preclusion of inconsistent positions, it may not disavow its allegations regarding the scope of the arbitration provisions. See, e.g. *In re Johnson*, 518 F.2d 246, 252 (10 Cir.), *cert. denied*, 423 U.S. 893; *Scarano* v. *Central Ry. Co. of New Jersey*, 203 F.2d 510, 513 (C.A. 3); 1B *Moore's Federal Practice*, ¶ 0.405[8] at 765-773.

even if the arbitration committee would not otherwise have had jurisdiction.[5] For these additional reasons it is incontrovertible that the union's position that it is entitled to arbitrate Pilot's breach of contract claim is far "more than merely colorable in the present case". *RKO General*, 546 F.2d at 1112-1113. Since the asserted insubstantiality of the appeal is the only ground on which respondent attempts to distinguish *RKO General*, the conflict between that decision and the Fourth Circuit's dismissal of the appeal in the present case is unmistakable.

[5] See, e.g. *Ficek* v. *Southern Pacific Co.*, 338 F.2d 655, 656-657 (C.A. 9); *Island Creek Coal Sales Co.* v. *Indiana-Kentucky Electric Corp.*, 366 F.Supp. 350 (S.D.N.Y.) *aff'd without opinion*, 498 F.2d 1393 (C.A. 2).

CONCLUSION

For the foregoing reasons and those stated in the Petition, certiorari should be granted. We submit also that because neither the Fourth Circuit nor respondent has advanced any basis for disagreeing with the reasoning of *RKO General*, and the analogy between the issue of appealability here and that recently decided in *Abney* v. *United States*, 431 U.S. 651 (see Pet. 10-13) is so close, it may be appropriate to summarily reverse the judgment below with directions to decide the appeal on the merits.

Respectfully submitted,

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